



## CITY OF LODI

## COUNCIL COMMUNICATION

**AGENDA TITLE:**

Hearing to Consider the Appeal of DC Builders to Overturn the Decision of the City Manager Regarding the Award of Bid for the Henning Substation Block Wall and Gate Project

**MEETING DATE:**

November 20, 2002

**PREPARED BY:**

Randall A. Hays, City Attorney

**RECOMMENDATION:**

That the City Council uphold the decision of the City Manager and deny the appeal of DC Builders.

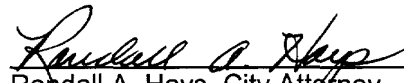
**BACKGROUND:**

The second low bidder for a project titled, Henning Substation, Block Wall and Gate, filed a timely protest to an award of the bid to the apparent low bidder. We are at the final level of review that is set out in the City's procedure for protesting bids. The letter from counsel for DC Builders moving this matter to the Council is attached as Exhibit A. The protest process ends with the City Council. To date, the concerns of DC Builders have been reviewed and rejected by the Electric Utility Director and the City Manager. What is specifically before you this evening is the decision of the City Manager. That decision with its exhibits is attached to this communication as Exhibit B. That which is attached is what was sent to counsel for DC Builders.

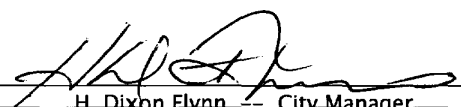
The current submittal of DC Builders revisits the points that have been addressed by the City Manager. It is necessary in order to succeed in this protest, to demonstrate that the decision of the City Manager is somehow flawed. Staff does not believe that the written submittal demonstrates that the decision of the City Manager should be overturned.

Funding: Not applicable.

Respectfully submitted,

  
Randall A. Hays, City Attorney

APPROVED:

  
H. Dixon Flynn, City Manager

**LAW OFFICES OF  
RANDALL D. ROXSON**

Attorney at Law  
813 F Street, 1<sup>st</sup> Floor  
Sacramento, California 95814  
Telephone (916) 447-2156  
Fax (916) 447-2422

**EXHIBIT A****RECEIVED****OCT 25 2002**City Clerk  
City of Lodi

October 25, 2002

**SENT VIA FACSIMILE & USPS**

City Council of Lodi  
Attention: City Clerk  
P.O. Box 3006  
Lodi, California 95241-1910

<input checked="" type="checkbox"/> CC	<input type="checkbox"/> HR
<input checked="" type="checkbox"/> CM	<input type="checkbox"/> IS
<input checked="" type="checkbox"/> CA	<input type="checkbox"/> LIB
<input type="checkbox"/> CD	<input type="checkbox"/> PR
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**Ref. Bid Protest--Henning Substation Block Wall and Gate Project**

Dear City Council Members:

I have been retained by Mr. David A. Clappis, owner and operator of DC Builders of Stockton, California to represent his company with its bid protest of the Henning Substation block wall and gate project in the city of Lodi, California. As such, on behalf of DC Builders, I hereby submit this Level Three Bid Protest regarding the above-referenced project, in accordance with all applicable state laws, local rules and procedures concerning bidding of public contracts.

Before I present findings of fact and rebuttal to the decision of the City Manager to deny this bid protest, I must first speak to the errors of process that occurred with this protest.

The City of Lodi has in place very comprehensive rules, entitled *City of Lodi Protest Procedures* for the processing of a bid protest. These procedural rules are in addition to those rules of the Public Contracts Code. Unfortunately, the City continuously violated its own rules of public process for bidding for public projects.

On behalf of my client, I submitted our Level One Bid Protest on September 3, 2002. Although the Department Head responded within the time limitations of the procedures, he failed to provide any such findings for his denial. The *City of Lodi Protest Procedures* require the City to "notify the protestor and any interested parties of his or her findings and actions and of the procedures for requesting reconsideration". [Emphasis Added] The City provided no findings nor did they provide procedures for requesting reconsideration.

Lodi City Council  
October 25, 2002  
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A timely Level Two Bid Protest was then filed with the City Manager. This protest was filed on September 15, 2002. I did not receive a response until October 1, 2002 indicating that a hearing would be scheduled. A hearing was ultimately scheduled for October 14, 2002. The *City of Lodi Protest Procedures* require the City to respond within five (5) business days from the submittal of the Request for Reconsideration, and to hold a hearing "not later than five (5) business days after the receipt of the Request for Reconsideration." Again, each provision was violated by the City.

It was interesting to find that the City of Lodi failed in most cases to comply with its own rules for due process. Unfortunately, the failure of the City to comply with its own rules did not stop with the bid protest.

In fact, I began to become concerned during the informal hearing conducted in the City Manager's Office on October 14, 2002. I sat before the City Manager, City Attorney, Director Alan Vallow, and Manager Hans Hansen of the Engineering Department. During this meeting the City Manager made light of the fact that the low bidder failed to follow city procedures for bidding public projects. In fact, the City Manager began to aggressively question me of the significance of such a failure of the bidder to comply with bidding procedures.

In light of this questioning, I responded to the City Manager stating that regardless of the significance of the rule, all other bidders must comply. And, if the rule was so insignificant, then why did the City require it. To my surprise, the City Attorney muttered "you're talking to much". This was very offensive. The only thing missing were the cigars and the smoke-filled room.

My client contends that because of incompleteness of the bid documents submitted by System 3, Inc. of Carmichael, California, we request that the Lodi City Council consider, for the purposes of this project, DC Builders as the "lowest responsible bidder" and therein award it the contract for this project. In the alternative, DC Builders requests that the Lodi City Council reject all bids and submit a new Request for Proposals for this particular public project.

The Public Contracts Code, as well as other local rules of the City of Lodi, specify that public contracts be awarded, in most all cases to the "lowest responsible bidder". In order to qualify for this standing, such a bid document must comply with all applicable laws, rules, and procedures for bidding public contracts. Although the City Manager asserts that the requirement for the "lowest responsible bidder" is governed by case law, and only refers to the ability that the contractor perform the contract as promised, the *City of Lodi Notice of Inviting Bids* Section 2.700 additionally requires that the bid proposal of the "lowest responsible bidder" comply with all the requirements described in the *City of Lodi Notice of Inviting Bids*.

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October 25, 2002  
Page Three

The *City of Lodi Notice of Inviting Bids* Section 2.400(A) states "[e]ach proposal shall include all addenda or clarifications issued during the bidding period acknowledged by the bidder's signature thereon. Failure to so include or acknowledge an addendum or clarification may result in the proposal being rejected as not responsive." [Emphasis Added]

This bid process required that a Receipt of Addendum No. 1 be submitted with the bid proposal. In fact, on the Receipt of Addendum No. 1 itself states in bold "**Note: This acknowledgment must be submitted with the Bid Proposal**". This would indicate the importance of this requirement.

Unfortunately, the City Manager, hungry for the lowest possible bid, decided to ignore this requirement by ruling it to be insignificant. He then decided to merely speculate that the bidder didn't receive the notice in an attempt to support his position. However, the City Manager does not know this to be fact, yet he uses it to defend his decision. Contriving facts to support a position has no place in the process of awarding government contracts.

In this case, System 3 Inc., the "lowest monetary bidder" failed to include in its bid documents the Receipt of Addendum No. 1, a requirement expressly addressed not only in the Receipt of Addendum No. 1 itself, but also by local rules (see Section 2.700). However, bid documents submitted by DC Builders, whom I allege is the "lowest responsible bidder" complies with all requirements of both state law and local rules for bidding for public contracts.

My client addresses the fact that the System 3, Inc. bid is considerably less than the Engineer's estimate of quantities of work to be done, which is \$95,000.00. In fact, the System 3, Inc. bid is \$25,400.00 less than the Engineer's Estimate. Section 2.700 of the local rules considers "that the "lowest responsible bidder" refers to not only the attribute of trustworthiness, but also to the quality, fitness, and capacity of the low monetary bidder to satisfactorily perform the proposed work." A bid considerably less than the Engineer's Estimate would suggest that the quality of materials and workmanship that can be contemplated may be less than expected by the public entity. In fact, this bid is less than the cost of the project would be to DC Builders.

In the City Manager's letter of denial, he states that "[w]hile the bid of System 3, Inc. is below the estimate, which may suggest to the City that vigilance is important on the City's part, a low bid by itself is not a basis for rejection." However, our bid protest is not relying solely on this act alone. Our protest looks at the "totality of the circumstances" surrounding this bid proposal; a bid proposal burdened with error. Awarding a contract to a bidder whose bid is flawed with error is only inviting litigation. It is the responsibility of the city to exercise its rules that are designed to protect the safety of the public and to prevent costly litigation that can adversely impact the city's budget.

Lodi City Council  
October 25, 2002  
Page Four

And finally, included in the Notice of Inviting Bids is expressed language announcing the opportunity for minority enterprises to compete for this public contract. However, the normal and customary process of informing subcontractors of public projects is from the Plans and Specifications List, of which the name of System 3, Inc. is absent. The omission of System 3, Inc. from this list impacts upon the spirit of attracting minority subcontractors from participating in the bidding process for public contracts.

In fact, the *City of Lodi Notice of Inviting Bids* expressly states "[t]he City of Lodi hereby notifies all bidders that it will affirmatively ensure that in any contract entered into pursuant to this advertisement, minority business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, sex or national origin in consideration for an award." [Emphasis Added] Ignoring the normal and customary processes for such notification is not affirmatively ensuring that all are afforded the full opportunity to submit bids.

As factually demonstrated, the bid proposal submitted by System 3, Inc. does not conform to the *City of Lodi Notice of Inviting Bids*. Nor did the City comply with its own rules for processing bid protests. In light of these errors and omissions of both the City and System 3, Inc., we request that the award for this public contract be given to DC Builders of Stockton pursuant to *City of Lodi Notice of Inviting Bids* Section 2.700. To do nothing would surely suggest that future bidding for public projects in the City of Lodi need not comply with local bidding rules.

On behalf of DC Builders, thank you for your consideration of this bid protest. Please send your response to this bid protest directly to my office. If you need further information, please give me a call.

Sincerely,

LAW OFFICES OF RANDALL D. ROXSON

by



RANDY D. ROXSON  
Attorney at Law

cc: DC Builders

CITY COUNCIL

PHILLIP A. PENNINO, Mayor  
SUSAN HITCHCOCK  
Mayor Pro Tempore  
EMILY HOWARD  
KEITH LAND  
ALAN S. NAKANISHI

CITY OF LODI

CITY HALL, 221 WEST PINE STREET  
P.O. BOX 3006  
LODI, CALIFORNIA 95241-1910  
(209) 333-6702  
FAX (209) 333-6807

H. DIXON FLYNN  
City Manager  
RANDALL A. HAYS  
City Attorney  
SUSAN J. BLACKSTON  
City Clerk

**EXHIBIT B**

October 17, 2002

Mr. Randy D. Roxson  
Attorney at Law  
813 F Street, 1<sup>st</sup> Floor  
Sacramento, CA 95814

Re: Bid Protest – DC Builders re: Henning Substation Block Wall and Gate

Dear Mr. Roxson:

This letter is in response to your Level Two protest to the above referenced project. This Level Two protest review follows your request for reconsideration of the Department Head's decision to deny your bid protest. Your Level Two protest letter dated September 15, 2002 was received by this office September 18, 2002.

Based upon agreement, we met to consider your protest on October 14, 2002 in the City Manager's Conference Room at City Hall here in Lodi. In attendance at that meeting, in addition to you and myself, were Electric Utility Director Alan Vallow, Hans Hansen, Manager, Engineering and Operations and Randy Hays, City Attorney. At this meeting you were given the opportunity to describe to me why you believed the City should not award a contract to the apparent low bidder, System 3, Inc. You presented and we discussed the points contained in your protest letter of September 15, 2002. Various documents were present such as the bid documents, Addendum #1 to the bid documents, as well as other documents relating to the disbursement of plans and specifications. I have reviewed all documents surrounding this project bid. Based upon my review and the following findings I hereby deny your protest.

I find that this project is a public project as defined in California Public Contracts Code §20161. This finding therefore makes it, pursuant to California Public Contracts Code §20162, a requirement that the award be made to the lowest responsible bidder.

Notice of this bid was published in the Lodi News-Sentinel on August 10<sup>th</sup> and 13<sup>th</sup>, 2002. The bids were opened August 28, 2002. Four bids were received. System 3, Inc., is the lowest bidder with your client DC Builders being the second low bidder. The bid of System 3, Inc., is \$69,600.00 while your clients bid is \$89,500.00. The engineer's estimate is \$95,000.00. There was one Addendum to the original bid specifications.

Your first point of contention in your appeal is that System 3, Inc., did not include with their bid package Addendum No. 1. You allege that since Addendum No. 1 states that an acknowledgement must be submitted with the bid proposal, failure to do so makes the bid non-responsive and therefore should not be considered by the City.

A review of the available documents suggests a different conclusion. The bid notice stated that "The City Council reserves the right to reject any and all bids and to waive any informality in the completion of such forms, and to award to the lowest responsible bidder. The bid specification, at page 2.2 in Section 2.400A states in the last paragraph, "Each proposal shall include all addenda or clarifications issued during the bidding period acknowledged by the bidder's signature thereon. Failure to so include or acknowledge an addendum or clarification may result in the proposal being rejected as not responsive."

Additionally, the nature of the addendum needs to be considered. The addendum issued on this project did not alter the nature of the project being bid. See Exhibit A. The addendum simply pointed out that bidders needed to be appropriately licensed as a contractor by the State of California. Lastly, in order to be able to return the addendum acknowledgement, one would first have to actually receive the addendum. The facts in this matter demonstrate that System 3, Inc., was never sent a copy of the addendum by the City. The City had no knowledge that System 3, Inc., had a copy of the plans and specifications. Exhibit B to this letter represents the listing of those that received plans and specifications. While we do not know for sure we believe that System 3, Inc., received or reviewed the plans and specifications at one of the list builders exchanges. It would not seem fair to penalize a bidder for not doing any act of which they had no knowledge.

Based upon the foregoing discussion it is my finding that the bid of System 3, Inc., is in substantial compliance with the bidding requirements for this project. I further find that the lack of submittal of the addendum acknowledgement is inconsequential having no effect on the bid submittal in that it did not affect the amount of the bid or give System 3, Inc., an advantage or benefit not allowed other bidders. Valley Crest Landscape v. City Council (1996) 41 Cal. App. 4<sup>th</sup> 1432, 49 Cal. Rptr. 2d 184; Konica Business Machines v. Regents of the University of California (1988) 206 Cal. App. 3d 449, 253 Cal. Rptr. 591.

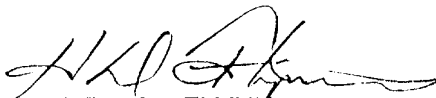
Another of your expressed concerns is that the bid of System 3, Inc., is somewhat below the Engineer's Estimate. The City recognizes that the low bid is somewhat below the estimate. However, there is no apparent mathematical error, nor is there any reason to believe that a bid submitted by a properly licensed contractor, who had an opportunity to review the plans and specifications, is not a valid bid. The City's obligation is to award to the lowest responsible bidder. A bidder is a responsible bidder if that bidder can perform the contract as promised. MCM Construction Inc., v. City & County of San Francisco (1998) 66 Cal. App. 4<sup>th</sup> 359, 78 Cal. Rptr. 2d 44. The City has a bid from a properly licensed contractor in System 3, Inc.; System 3, Inc., has done other projects successfully; and the current owner of System 3, Inc., has done previous work successfully for the City. You have presented no evidence for my consideration which would indicate that System 3, Inc., cannot perform this project in a responsible manner. While the bid of System 3, Inc., is below the estimate, which may suggest to the City that vigilance is important on the City's part, a low bid by itself is not a basis for rejection.

You also express some concerns about the listing of subcontractors. The City's specifications require that a prime contractor (System 3, Inc.) list subcontractors who will perform work or labor in excess of one-half of one percent of the total amount bid. This requirement is consistent with what is found in §4014 of the California Public Contracts Code. Work that is not listed as being performed by a subcontractor is the responsibility of the prime contractor. See City Specifications/bid form and §4106 of the California Public Contracts Code. System 3, Inc., listed two subs on its bid submittal. One sub is shown for masonry work and one sub for temporary fencing. Based upon the contract documents and the California Public Contracts Code the remaining work must be done by the prime contractor. That is the prime's obligation and the City's expectation. You have presented no evidence which demonstrates that System 3, Inc., cannot meet the City's expectations. On the strength of your presentation I find no basis for rejection of the bid of System 3, Inc.

Your final point I will address seems to revolve around some concerns that minority business enterprises were somehow unable to compete for this project. I would first point out that you have not suggested that this is an argument that applies to your client. You instead seem to be suggesting that there is a class of bidder out there that was denied an opportunity to bid since we did not show System 3, Inc., on our mailing list. Exhibit C to this letter is the list to which the City directly sent notices inviting bids. As previously indicated, Exhibit B is the listing of those that actually received plans and specifications. A review of that list demonstrates a wide array of recipients ranging from contractors, to builders exchanges, to a state agency. Of particular note is that the State of California, Department of General Services received plans and specifications. These were sent to them in order to directly address the concern you express. The Department of General Services is a repository to which minority business may refer in order to become aware of governmental projects. Builder's exchanges are as well a resource that is available to assist in the discovery of projects available as well as who has reviewed plans and specifications. As with your other issues, I find nothing in the record before me which would support ~~or~~ award to other than the low bidder.

Pursuant to the City's procedures, you may wish to move this denial of your protest to level three. An additional copy of our procedures is supplied with this letter as Exhibit D. Thank you for your attention to this matter.

Very truly yours,



H. DIXON FLYNN  
City Manager

HDF/pn



# EXHIBIT A

CITY OF LODI  
Electric Utility Department

ADDENDUM NO. 1

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PROJECT: HENNING SUBSTATION  
Block Wall and Gate

Notice is hereby given that the contractor's license requirement has been changed as follows:

## SECTION 1. NOTICE INVITING BIDS

### Page 1.2

Eliminate:


~~The prime contractor on this project shall possess a valid State of California Class-B contractor's license.~~

Add:

Bids must be from appropriately **State of California** licensed contractors.

Dated: August 20, 2002

Ordered by: Hans Hansen  
Manager, Engineering and Operations

  
Hans Hansen  
Manager, Engineering and Operations

**City of Lodi, Electric Utility Department  
Plans and Specifications List**

**EXHIBIT B**

**HENNING SUBSTATION  
BLOCK WALL & GATE**

**Estimated Cost \$95,000**

**Bid Opening - August 28, 2002, 11:00 a.m.**

Company	Attention	Address	City, State, Zip	Phone	Bk.#
Electric Utility Department	Hans Hansen	MSC	Lodi CA		1
Electric Utility Department	Jess Kerekes	MSC	Lodi CA		2
Purchasing Department	Joel Harris	MSC	Lodi CA		3
Public Works Dept.	Wally Sandelin	City Hall	Lodi CA		4
Contractors Information Network	Jim	<u>P.O. Box 6390</u> 1629 Pollansky #113	<u>Fresno CA 93703</u> Clovis CA 93612	559 325-7054	5
F W Dodge	Isabell	1791 Tribute Road, Suite D	Sacramento CA 95815	916-920-2240	6
Sacramento Builders Exchange	Margery Miller	1331 T Street	Sacramento CA 95814	916 442-8991	7
Small and Minority Businesses	Department of General Services	1531 I Street Floor 2	Sacramento CA 95814-2016		8
Stockton Builders Exchange		<u>P.O. Box 8040</u> 7500 N. West Lane	<u>Stockton CA 95208</u> Stockton CA 95210	209 478-1000	9
Valley Builders Exchange	Marty Nard	<u>P.O. Box 4307</u> 1118 Kansas	<u>Modesto CA 95352</u> Modesto CA 95351	209 522-9031	10
Diede Construction		<u>P.O. Box 1007</u> 11780 N. Highway 99	Woodbridge CA 95258 Lodi CA 95240	209 369-8255	11
DC Builders	David Clappis	1203 Buena Vista Avenue, Suite A	Stockton CA		12
Younger General Contractors Inc.	Court Younger	3358 Luyung Drive, Unit B	Rancho Cordova CA 95742	(916) 631-8000	13
Placer Co Contractors Assoc	Chea	271 Auburn Ravine Road	Auburn CA 95603		14
Case Construction	Wally Case	1225 S Sacramento St	Lodi CA 95240	334-9634	15
					16
					17

# HENNING SUBSTATION BLOCK WALL AND GATE

## EXHIBIT C

Mailing List: ***Notice Inviting Bids and Information to Bidders.***

August 2002

Company	Attention	Address	City, State, Zip	Phone	Bk.#
DC Builders		1203 A Buena Vista Avenue	Stockton CA 95203	462-4004	
Diede Construction		PO Box 1007	Woodbridge CA 95259	369-8255	
Ed Loo Masonry		1115 Black Diamond Way	Lodi CA 95240	333-7824	
GTS Construction		1238 Bentwood Drive	Galt CA 95632		
H Max Lee Inc.		PO Box 1690	Lodi CA 95241		
John D. Wait Masonry	John Wait	16201 N. Tretheway	Lodi CA 95240		
Matt McCarty	Matt McCarty	417 River Meadows	Woodbridge CA 95258		
Wally Case		1225 S. Sacramento Street	Lodi CA 95240		

General Conditions

The City's review of any protest will be limited to violations of state or local laws or regulations, violations of the City's acquisition procedures, violations of the City's protest procedures, or City's failure to review a complaint or protest.

Protests based on restrictive or severely defective specifications, or improprieties in any type of solicitations that are apparent prior to closing date for proposals, must be received by the City within a reasonable time in advance of scheduled proposal receipt but no later than five (5) business days after receipt of the bid by the proposer. All other protests must be received by the City within five (5) business days of the action on which the protest is based.

The initial protest filed with the City shall be in writing and shall:

1. Include the name, address and telephone number of the protester, and the name of a contact person.
2. Identify the number, date and description of the solicitation.
3. Contain a statement of the grounds for protest and any supporting documentation. The grounds for the protest must be supported to the fullest extent feasible. Additional materials in support of an initial protest will be considered only if filed within the time limits specified.
4. Indicate the ruling or relief desired from the City.

A protest may be considered, even if the initial filing is late, under the following circumstances:

1. Good cause based on compelling reasons which are beyond the protester's control, whereby the lateness is due to the fault of the City in the handling of the protest submission.
2. The City determines the protest raised significant issues to a procurement practice or procedure.
3. A court or competent jurisdiction requests, expects or otherwise expresses interest in the City's decision.

No formal briefs or other technical forms of pleading or motion are required, but a protest and other submissions should be concise, logically arranged, clear and legible.

Any additional information requested or required by the City from the protester, or interested parties shall be submitted as expeditiously as possible, but in no case later than five (5) business days after the receipt of such request unless specifically excepted by the City.

**CONFIDENTIALITY**

Materials submitted by a protester will not be withheld from any interested party outside of the City or from any Government agency which may be involved in the protest, except to the extent that the withholding of information is permitted or required by law or regulation. If the protester considers that the protest contains proprietary materials which should be withheld, a statement advising of this fact may be affixed to the front page of the protest document and the alleged proprietary information must be so identified wherever it appears.

# EXHIBIT D

## FURNISHING OF INFORMATION ON PROTESTS

The City shall, upon request, make available to any interested party, information bearing on the substance of the protest, including:

1. Any other documents that pertain to the protest, including correspondence with the bidders, and
2. A statement by the City explaining its actions and the reasons for them.

## WITHHOLDING OF AWARD

When a protest has been filed before the deadline for submitting proposals, the City will not open proposals prior to the resolution of the protest. When a protest has been filed after the opening of the bids but before the contract award, the City will not make an award for five days following its decision on the protest. When a protest has been filed after the award but prior to execution of the contract, the City will not proceed with the execution of the contract prior to resolution of the protest. Exceptions to the above may occur if the City determines that:

1. The items or services to be procured are urgently required, or
2. Delivery or performance will be unduly delayed by failure to either make the award promptly or to continue with the procurement, or
3. Failure to make prompt award or to continue with the acquisition will otherwise cause undue hardship to the City.

## PROTEST REVIEW - LEVEL ONE

Upon receipt of a protest, the head of the department initiating the procurement will review all relevant materials associated with the protest. The Department Head will notify the protester and any interested parties of his or her findings and actions and of the procedures for requesting reconsideration. The report shall include the following as relevant:

1. Copies of all relevant documents;
2. A copy of the Request for Proposals, including pertinent provisions of the specifications.
3. A copy of the abstract of bids.

## PROTEST REVIEW - LEVEL TWO

Reconsideration of a decision by the Department Head may be requested by the protester or any interested party. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law or fact made.

The request for reconsideration of the Department Head's decision shall be filed no later than five (5) business days after the Department issues its written report, and shall be filed with the City Manager.

Upon receipt of the request for reconsideration, the City Manager shall schedule an informal administrative hearing with the protester and the Department Head. The hearing shall be held not later than five (5) business days after the receipt of the request for reconsideration. The City Manager shall issue, in writing, the City's response to the reconsidered protest within five (5) business days of the administrative hearing.

## EXHIBIT D

### PROTEST REVIEW – LEVEL THREE

Reconsideration of a decision by the City Manager may be requested by the protester or any interested party at a hearing by the Lodi City Council. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law or fact made.

The request for a hearing by the City Council shall be filed no later than five (5) business days after the City Manager has rendered his or her decision, and shall be filed with the City Clerk.

Upon receipt of the request for reconsideration, the City Clerk shall schedule the hearing on the agenda of the City Council. The hearing shall be held not sooner than fourteen (14) calendar days, nor later than thirty (30) calendar days, after the receipt of the request for hearing. The protester may address the City Council with factual and legal arguments in favor of reversal or modification of the decision of the City Manager.

The appellant process ends with the City Council's decision; however, the aggrieved party has those remedies afforded by the state courts.

The City may refuse to decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction.

**FILE COPY**

**LAW OFFICE OF RANDALL D. ROXSON**

**813 'F' Street, 1<sup>st</sup> Floor  
Sacramento, California 95814**

**Tel (916) 447-2156 Fax (916) 447-2422**

**FACSIMILE TRANSMISSION**

**To: City Council of Lodi  
Attn: City Clerk**

**Fax#: (209) 333-6807**

**From: Randy D. Roxson, Attorney at Law**

**Date: 10/25/02**

**Ref: Bid Protest--Henning Substation Block Wall and Gate Project**

**Page(s) (incl. cover): 2**

**RECEIVED**

**OCT 25 2002**

**City Clerk,  
City of Lodi**

**Message**

**Please see attached. Thank you.**

<input checked="" type="checkbox"/> CC	<input type="checkbox"/> HR
<input checked="" type="checkbox"/> CM	<input type="checkbox"/> IS
<input checked="" type="checkbox"/> CA	<input type="checkbox"/> LIB
<input type="checkbox"/> CD	<input type="checkbox"/> PR
<input checked="" type="checkbox"/> EUD	<input type="checkbox"/> PD
<input type="checkbox"/> FIN	<input type="checkbox"/> PW
<input type="checkbox"/> FD	<input type="checkbox"/> COM

THE INFORMATION CONTAINED IN THIS FACSIMILE IS CONFIDENTIAL AND MAY CONTAIN PRIVILEGED ATTORNEY-CLIENT INFORMATION OR WORK PRODUCT. THE INFORMATION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHOM IT IS ADDRESSED. IF YOU ARE NOT THE INTENDED RECIPIENT, ANY USE, DISSEMINATION, OR DISTRIBUTION OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US. THANK YOU FOR YOUR COOPERATION.

LAW OFFICES OF  
**RANDALL D. ROXSON**

Attorney at Law  
813 'F' Street, 1<sup>st</sup> Floor  
Sacramento, California 95814  
Telephone (916) 447-2156  
Fax (916) 447-2422

RECEIVED

2002 OCT 25 AM 9:25

CITY CLERK  
CITY OF LODI

October 24, 2002

**SENT VIA FACSIMILE & USPS**

City Council of Lodi  
Attention: City Clerk  
P.O. Box 3006  
Lodi, California 95241-1910

**Ref. Bid Protest--Henning Substation Block Wall and Gate Project**

Dear Council members:

I have been retained by Mr. David A. Clappis, owner and operator of DC Builders of Stockton, California to represent his company with its bid protest of the Henning Substation block wall and gate project in the city of Lodi, California. As such, on behalf of DC Builders, I hereby submit this Level Three Bid Protest regarding the above-referenced project, in accordance with all applicable state laws, local rules and procedures concerning bidding of public contracts.

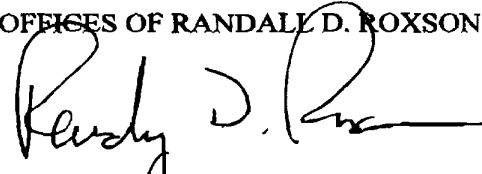
As such, I request reconsideration of the decision made by the City Manager in regard to the award of this contract, and that a hearing be scheduled in this regard. All findings of fact and rebuttal to the City Manager's findings will be provided under separate cover.

If you need further information, please give me a call.

Sincerely,

LAW OFFICES OF RANDALL D. ROXSON

by



**RANDY D. ROXSON**  
Attorney at Law

cc: DC Builders





filed 11-20-02  
Item I-7

RECEIVED  
AUG 30 2002  
City Clerk  
City of Lodi

August 28, 2002

City of Lodi  
Electric Utility Department  
1331 South Ham Lane  
Lodi, CA 95242

RE: Henning Substation Block Wall and Gate

NOTICE OF INTENT TO PROTEST

To Whom It May Concern:

I am forwarding the bid documents for the above referenced project to legal counsel for review and to validate and file a formal protest. This is based upon information I received via telephone conversation that indicated your intent to award this project to the apparent low bidder despite the fact that he failed to complete and submit all the required bid documents, i.e., Addendum #1.

Under Section 2.700, Award of Contract, it states that the contract, if awarded, will be to the lowest responsible bidder whose bid complies with all the requirements described.

Addendum #1 clearly states the requirement that the acknowledgement be signed and returned with the bid proposal.

The failure to submit a complete bid package should render the bid as non-responsive and should not be considered. The failure of the contractor to do so also reflects his lack of due diligence in preparing and submitting this bid. This goes to fitness, capacity and trustworthiness as outlined in Section 2.700.

Regardless of the content of the Addendum and its affect on the contract price, three of the four bidders complied fully and responsibly.

I will, as stated previously, discuss this matter with counsel for further action and notify you within 10 days with formal protest. In order to provide counsel with all pertinent documents pertaining to this bid, please forward via mail or fax, a copy of the addendum and the apparent low bidders proposal as submitted at the time of bid.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read 'D. A. Clappis'.

David A. Clappis, Owner  
DC BUILDERS

Cc: City Clerk

FILE COPY

**LAW OFFICE OF RANDALL D. ROXSON**

813 'F' Street, 1<sup>st</sup> Floor

Sacramento, California 95814

Tel (916) 447-2156 Fax (916) 447-2422

**FACSIMILE TRANSMISSION**

**To:** Mayor, City of Lodi  
**From:** Randy D. Roxson, Attorney at Law  
**Date:** 9/17/02  
**Ref:** Henning Substation Bid Protest  
**Page(s) (incl. cover):** 1

**Message**

Dear Mayor:

Currently there is a bid protest in the process for the Henning Substation project of which a contract is scheduled to be awarded at the next city council's meeting.

Please suspend awarding this contract until the bid protest is fully heard.

Thank you for your consideration.

Sincerely,

LAW OFFICES OF RANDALL D. ROXSON

by

*Randy D. Roxson*  
RANDY D. ROXSON  
Attorney at Law

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<input checked="" type="checkbox"/> CM	<input type="checkbox"/> IS
<input checked="" type="checkbox"/> CA	<input type="checkbox"/> LIB
<input checked="" type="checkbox"/> CD	<input type="checkbox"/> PR
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Dictated by the writer; signed and mailed  
in his absence to avoid delay.

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RECEIVED

OCT 28 2002

City Clerk  
City of Lodi

October 24, 2002

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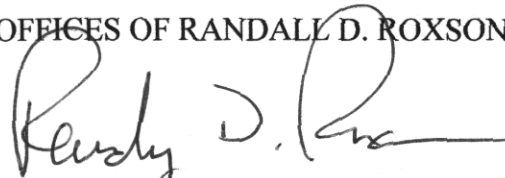
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If you need further information, please give me a call.

Sincerely,

LAW OFFICES OF RANDALL D. ROXSON

by



RANDY D. ROXSON  
Attorney at Law

cc: DC Builders

<input checked="" type="checkbox"/> CC	<input type="checkbox"/> HR
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Fax (916) 447-2422

**FILE COPY****RECEIVED****OCT 25 2002**City Clerk  
City of Lodi

October 25, 2002

**SENT VIA FACSIMILE & USPS**

City Council of Lodi  
Attention: City Clerk  
P.O. Box 3006  
Lodi, California 95241-1910

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Before I present findings of fact and rebuttal to the decision of the City Manager to deny this bid protest, I must first speak to the errors of process that occurred with this protest.

The City of Lodi has in place very comprehensive rules, entitled *City of Lodi Protest Procedures* for the processing of a bid protest. These procedural rules are in addition to those rules of the Public Contracts Code. Unfortunately, the City continuously violated its own rules of public process for bidding for public projects.

On behalf of my client, I submitted our Level One Bid Protest on September 3, 2002. Although the Department Head responded within the time limitations of the procedures, he failed to provide any such findings for his denial. The *City of Lodi Protest Procedures* require the City to "notify the protestor and any interested parties of his or her findings and actions and of the procedures for requesting reconsideration". [Emphasis Added] The City provided no findings nor did they provide procedures for requesting reconsideration.

Lodi City Council  
October 25, 2002  
Page Two

A timely Level Two Bid Protest was then filed with the City Manager. This protest was filed on September 15, 2002. I did not receive a response until October 1, 2002 indicating that a hearing would be scheduled. A hearing was ultimately scheduled for October 14, 2002. The *City of Lodi Protest Procedures* require the City to respond within five (5) business days from the submittal of the Request for Reconsideration, and to hold a hearing "not later than five (5) business days after the receipt of the Request for Reconsideration." Again, each provision was violated by the City.

It was interesting to find that the City of Lodi failed in most cases to comply with its own rules for due process. Unfortunately, the failure of the City to comply with its own rules did not stop with the bid protest.

In fact, I began to become concerned during the informal hearing conducted in the City Manager's Office on October 14, 2002. I sat before the City Manager, City Attorney, Director Alan Vallow, and Manager Hans Hansen of the Engineering Department. During this meeting the City Manager made light of the fact that the low bidder failed to follow city procedures for bidding public projects. In fact, the City Manager began to aggressively question me of the significance of such a failure of the bidder to comply with bidding procedures.

In light of this questioning, I responded to the City Manager stating that regardless of the significance of the rule, all other bidders must comply. And, if the rule was so insignificant, then why did the City require it. To my surprise, the City Attorney muttered "you're talking to much". This was very offensive. The only thing missing were the cigars and the smoke-filled room.

My client contends that because of incompleteness of the bid documents submitted by System 3, Inc. of Carmichael, California, we request that the Lodi City Council consider, for the purposes of this project, DC Builders as the "lowest responsible bidder" and therein award it the contract for this project. In the alternative, DC Builders requests that the Lodi City Council reject all bids and submit a new Request for Proposals for this particular public project.

The Public Contracts Code, as well as other local rules of the City of Lodi, specify that public contracts be awarded, in most all cases to the "lowest responsible bidder". In order to qualify for this standing, such a bid document must comply with all applicable laws, rules, and procedures for bidding public contracts. Although the City Manager asserts that the requirement for the "lowest responsible bidder" is governed by case law, and only refers to the ability that the contractor perform the contract as promised, the *City of Lodi Notice of Inviting Bids* Section 2.700 additionally requires that the bid proposal of the "lowest responsible bidder" comply with all the requirements described in the *City of Lodi Notice of Inviting Bids*.

Lodi City Council  
October 25, 2002  
Page Three

The *City of Lodi Notice of Inviting Bids* Section 2.400(A) states "[e]ach proposal shall include all addenda or clarifications issued during the bidding period acknowledged by the bidder's signature thereon. Failure to so include or acknowledge an addendum or clarification may result in the proposal being rejected as not responsive." [Emphasis Added]

This bid process required that a Receipt of Addendum No. 1 be submitted with the bid proposal. In fact, on the Receipt of Addendum No. 1 itself states in bold "**Note: This acknowledgment must be submitted with the Bid Proposal**". This would indicate the importance of this requirement.

Unfortunately, the City Manager, hungry for the lowest possible bid, decided to ignore this requirement by ruling it to be insignificant. He then decided to merely speculate that the bidder didn't receive the notice in an attempt to support his position. However, the City Manager does not know this to be fact, yet he uses it to defend his decision. Contriving facts to support a position has no place in the process of awarding government contracts.

In this case, System 3 Inc., the "lowest monetary bidder" failed to include in its bid documents the Receipt of Addendum No. 1, a requirement expressly addressed not only in the Receipt of Addendum No. 1 itself, but also by local rules (see Section 2.700). However, bid documents submitted by DC Builders, whom I allege is the "lowest responsible bidder" complies with all requirements of both state law and local rules for bidding for public contracts.

My client addresses the fact that the System 3, Inc. bid is considerably less than the Engineer's estimate of quantities of work to be done, which is \$95,000.00. In fact, the System 3, Inc. bid is \$25,400.00 less than the Engineer's Estimate. Section 2.700 of the local rules considers "that the 'lowest responsible bidder' refers to not only the attribute of trustworthiness, but also to the quality, fitness, and capacity of the low monetary bidder to satisfactorily perform the proposed work." A bid considerably less than the Engineer's Estimate would suggest that the quality of materials and workmanship that can be contemplated may be less than expected by the public entity. In fact, this bid is less than the cost of the project would be to DC Builders.

In the City Manager's letter of denial, he states that "[w]hile the bid of System 3, Inc. is below the estimate, which may suggest to the City that vigilance is important on the City's part, a low bid by itself is not a basis for rejection." However, our bid protest is not relying solely on this act alone. Our protest looks at the "totality of the circumstances" surrounding this bid proposal; a bid proposal burdened with error. Awarding a contract to a bidder whose bid is flawed with error is only inviting litigation. It is the responsibility of the city to exercise its rules that are designed to protect the safety of the public and to prevent costly litigation that can adversely impact the city's budget.

Lodi City Council  
October 25, 2002  
Page Four

And finally, included in the Notice of Inviting Bids is expressed language announcing the opportunity for minority enterprises to compete for this public contract. However, the normal and customary process of informing subcontractors of public projects is from the Plans and Specifications List, of which the name of System 3, Inc. is absent. The omission of System 3, Inc. from this list impacts upon the spirit of attracting minority subcontractors from participating in the bidding process for public contracts.

In fact, the *City of Lodi Notice of Inviting Bids* expressly states "[t]he City of Lodi hereby notifies all bidders that it will affirmatively ensure that in any contract entered into pursuant to this advertisement, minority business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, sex or national origin in consideration for an award." [Emphasis Added] Ignoring the normal and customary processes for such notification is not affirmatively ensuring that all are afforded the full opportunity to submit bids.

As factually demonstrated, the bid proposal submitted by System 3, Inc. does not conform to the *City of Lodi Notice of Inviting Bids*. Nor did the City comply with its own rules for processing bid protests. In light of these errors and omissions of both the City and System 3, Inc., we request that the award for this public contract be given to DC Builders of Stockton pursuant to *City of Lodi Notice of Inviting Bids* Section 2.700. To do nothing would surely suggest that future bidding for public projects in the City of Lodi need not comply with local bidding rules.

On behalf of DC Builders, thank you for your consideration of this bid protest. Please send your response to this bid protest directly to my office. If you need further information, please give me a call.

Sincerely,

LAW OFFICES OF RANDALL D. ROXSON

by

A handwritten signature in black ink, appearing to read "Randy D. Roxson", is written over the printed name.

RANDY D. ROXSON  
Attorney at Law

cc: DC Builders